

NEW YORK STATE
DEPARTMENT OF ECONOMIC DEVELOPMENT
633 THIRD AVENUE
NEW YORK, NY 10017

In the Matter

- of -

the Application of **AAA Contracting Services Corp.**
for Certification as a Minority-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 60417

RECOMMENDED ORDER

- by -



Richard A. Sherman
Administrative Law Judge

January 9, 2018

SUMMARY

This report recommends that the determination of the Division of Minority and Women's Business Development ("Division") of the New York State Department of Economic Development to deny AAA Contracting Services Corp. ("AAA Contracting" or "applicant"), certification as a minority-owned business enterprise ("MBE") be affirmed for the reasons set forth below.

PROCEEDINGS

This matter involves the appeal by applicant, pursuant to New York State Executive Law Article 15-A and Title 5 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("NYCRR") Parts 140-144, challenging the determination of the Division that AAA Contracting does not meet the eligibility criteria for certification as a MBE.

The Division denied the application (exhibit 1) filed by AAA Contracting for MBE certification by letter dated January 13, 2017 (exhibit 3). The letter sets forth three grounds under 5 NYCRR 144.2 for the denial. Applicant filed a request for a hearing ("hearing request"), dated February 6, 2017. The Division advised applicant that the hearing on this matter would be held on November 7, 2017 (letter from the Division to applicant, dated June 21, 2017).

I convened the hearing at approximately 12:00 p.m. on November 7, 2017, at the Division's offices located at 633 Third Avenue, New York, New York. Amandeep Dhaliwal and Gurminder Dhaliwal appeared on behalf of AAA Contracting and each provided testimony. Mr. Dhaliwal cross examined the Division's witness and made a closing statement on behalf of the applicant. Phillip Harmonick, Esq., Assistant Counsel, New York State Department of Economic Development, represented the Division and called one witness, Iliana Farias, Director of Certification, Division of Minority and Women's Business Development. A list of the exhibits received during the hearing is appended to this report.

Consistent with 5 NYCRR 145.1(m), an audio recording of the hearing was made. A copy of the audio recording on compact disc ("CD") was provided to me on December 1, 2017, whereupon, the hearing record closed.

ELIGIBILITY CRITERIA

The eligibility criteria pertaining to certification as a MBE are established by regulation (see 5 NYCRR 144.2). For the purposes of determining whether an applicant should be granted or denied MBE status, the ownership, operation, control, and independence of the business enterprise are assessed on the basis of information supplied through the application process. The Division reviews the enterprise as it existed at the time that the application was made, based on representations in the application itself, and on information revealed in supplemental submissions or interviews that are conducted by Division analysts.

STANDARD OF REVIEW

On this administrative appeal, applicant bears the burden of proving that the Division's denial of MBE certification for AAA Contracting is not supported by substantial evidence (see State Administrative Procedure Act § 306[1]). The substantial evidence standard "demands only that a given inference is reasonable and plausible, not necessarily the most probable," and applicant must demonstrate that the Division's conclusions and factual determinations are not supported by "such relevant proof as a reasonable mind may accept as adequate" (Matter of Ridge Rd. Fire Dist. v Schiano, 16 NY3d 494, 499 [2011] [internal quotation marks and citations omitted]).

POSITIONS OF THE PARTIES

Position of the Division

The Division cites three bases for the denial of AAA Contracting's application. First, the Division argues that applicant failed to establish that the minority owner, Amandeep Dhaliwal, has adequate managerial experience or technical competence to operate the business enterprise (exhibit 3 at 2 [citing 5 NYCRR 144.2(b)(1)(i)]). Second, the Division argues that applicant failed to establish that Amandeep Dhaliwal makes decisions pertaining to the operations of the business enterprise (exhibit 3 at 2 [citing 5 NYCRR 144.2(b)(1)]). Third, the Division argues that applicant failed to demonstrate through the production of signed contracts that Amandeep Dhaliwal controls negotiations (exhibit 3 at 3 [citing 5 NYCRR 144.2(b)(3)]).

Position of Applicant

Applicant states that the "reasons [cited by the Division] don't justify our denial" (hearing request). Applicant also notes that it received MBE certification from New York City, Small Business Services, and MWBE certification from the Port Authority of NY & NJ after applicant was interviewed by these authorities (id.). Applicant argues that these other certifying authorities "understand how our firm is being managed and hence . . . our applications were approved" (id.).

FINDINGS OF FACT

1. AAA Contracting is a corporation, established on March 1, 2010, that provides a variety of construction related services, including "General Contractor, Masonry, Concrete, Demo[lition], Roofing" and others (exhibit 1 at 9 [item 13], 16 [item 37]).
2. In its MBE application, AAA Contracting identified Amandeep Dhaliwal as the President and 100% owner of AAA Contracting (exhibit 1 at 11 [items 18, 19]).¹

¹At the hearing, applicant represented that Amandeep Dhaliwal's husband, Gurminder Dhaliwal, now owns 49% of AAA Contracting (CD at 38:20 [Gurminder Dhaliwal testimony]). Because this information was not before the Division at the time of the denial, it has no bearing on the issues under consideration in this recommended order.

3. Amandeep Dhaliwal received no wages or salary from AAA Contracting in 2014 or 2015 (exhibit 5 at 3 [NYS Quarterly Combined Withholding, Part C, for AAA Contracting listing the two employees who received wages in 2015]; exhibit 6 at 1, line 7 [Amandeep Dhaliwal's 2014 IRS Form 1040 tax return; attached Form W-2 shows that all wages Ms. Dhaliwal received were from Queens Long Island Medical Group PC]; CD at 12:20, 13:05, 15:30 [Farias testimony that 2014 and 2015 tax documents show that Ms. Dhaliwal received no wages or salary from AAA Contracting in those years]).

4. Prior to becoming the owner of AAA Contracting in 2010, Amandeep Dhaliwal had not worked in the contracting business (exhibit 7 at 1; CD at 17:50 [Farias testimony that the documentation before the Division did not show that Amandeep Dhaliwal had relevant experience]).

5. Sukhjinder Singh was, at the time that AAA Contracting submitted its MBE application, Vice President of AAA Contracting (exhibit 1 at 13 [item 24]). Mr. Singh was one of two employees who received wages from AAA Contracting in 2015 and was the highest paid employee by a substantial amount (exhibit 5 at 3 [NYS Quarterly Combined Withholding, Part C, for AAA Contracting showing 2015 wages]; CD at 12:20 [Farias testimony regarding Mr. Singh's compensation]).

6. Gurminder Dhaliwal was the Vice President/Project Manager of AAA Contracting from March 2010 to June 2012, and became Vice President/Project Manager again in January 2016 (exhibit 8 at 1, 3 [Gurminder Dhaliwal's resume]). Mr. Dhaliwal has substantial relevant experience in contracting work, has served as a project manager or vice president at various companies since 2008, and has been certified as a rigging foreman (*id.* at 1-3; exhibit 9; CD at 18:55 [Farias testimony regarding Mr. Dhaliwal's experience]).

7. The two fully executed contracts that were supplied by applicant as part of its MBE application were both signed by Gurminder Dhaliwal on behalf of AAA Contracting (CD at 20:45, 21:45; exhibit 10 at 16; exhibit 11 at 20). The one contract supplied by applicant that was signed by Amandeep Dhaliwal was not signed by the other party to the contract (CD at 24:20; exhibit 12 at 16).

DISCUSSION

This report considers applicant's appeal from the Division's determination to deny certification of AAA Contracting as a MBE pursuant to Executive Law Article 15-A. The Division cites three bases in support of upholding the denial, each of which is discussed below.

Operation: Managerial Experience or Technical Expertise

The eligibility criterion at issue requires that the applicant demonstrate that the minority group members "have adequate managerial experience or technical competence in the business enterprise seeking certification" (5 NYCRR 144.2[b][1][i]).

The Division states that its determination to deny the application on this criterion is supported by the fact that the application materials submitted by AAA Contracting do not demonstrate that Amandeep Dhaliwal had "any relevant managerial experience or training in the general contracting industry prior to forming AAA [Contracting]" (exhibit 3 at 2). The Division further notes that Gurminder Dhaliwal, AAA Contracting's Vice President, has ten years of relevant experience and has completed training as a rigger foreman (id.).

Applicant asserts that its business began slowly, with revenue of only \$25,000 in its first year, and that Amandeep Dhaliwal began gaining experience at that time (CD at 39:15 [Gurminder Dhaliwal testimony]). Amandeep Dhaliwal acknowledged that she did not have experience prior to opening AAA Contracting and testified that it was "with his [Gurminder Dhaliwal's] experience we opened it" (CD at 45:50, 45:55; see also exhibit 8 at 1, 3 [Gurminder Dhaliwal's resume stating that he was AAA Contracting's Vice President/Project Manager from March 2010 to June 2012, and again from January 2016 to present]).

Although not indicated on her resume, the application materials indicate that Amandeep Dhaliwal worked at Queens Long Island Medical Group PC in 2014 (see findings of fact ¶ 3). At the hearing, Applicant stated that Ms. Dhaliwal "quit her job" sometime after 2015 (CD at 53:05 [Gurminder Dhaliwal closing statement]). The record indicates that Ms. Dhaliwal's experience in the contracting field is limited to her work at AAA Contracting (see findings of fact ¶ 4). In contrast, the record shows Gurminder Dhaliwal has extensive experience in the industry (see findings of fact ¶ 6).

Applicant failed to meet its burden to demonstrate that the record that was before the Division at the time of the denial did not contain substantial evidence to support the Division's determination that Amandeep Dhaliwal does not have adequate managerial experience or technical competence in the business enterprise seeking certification as required by 5 NYCRR 144.2(b)(1)(i).

Operation: Decisions Pertaining to Operations

The eligibility criterion at issue provides that "[d]ecisions pertaining to the operations of the business enterprise must be made by minority group members . . . claiming ownership of that business enterprise" (5 NYCRR 144.2[b][1]).

The Division argues that applicant failed to demonstrate that Amandeep Dhaliwal makes decisions pertaining to the enterprise's core functions, including estimating and supervising field operations (exhibit 3 at 2; CD at 49:45).

Applicant states that it was certified as an MBE by The Port Authority of New York & New Jersey after the Port Authority conducted an on-site interview "to understand how [AAA Contracting] is being managed" (hearing request). Applicant argues that the Division's determination to deny the MBE application was based on insufficient information because the Division relied on the application materials alone and "never gave [AAA Contracting] any call back or . . . office visit" (CD at 4:00).

The application materials support the Division's determination that applicant failed to establish that Amandeep Dhaliwal makes decisions pertaining to AAA Contracting's core business functions. The application states that, at the that time the application was submitted, responsibility for most business functions was shared between Amandeep Dhaliwal and Sukhjinder Singh (exhibit 1 at 13 [item 24]).

In response to a document request from the Division in January 2017 (see exhibit 2 [item 3]), applicant identified Amandeep Dhaliwal and Gurminder Dhaliwal as AAA Contracting's key personnel (exhibit 4). Applicant's response states that Amandeep Dhaliwal works 30 hours per week at AAA Contracting and that her duties include accounting, marketing, sales, and payroll, while Gurminder Dhaliwal works 40 hours per week and that his duties include estimating, project management, payroll, hiring and firing, purchasing equipment, and negotiating contracts (id.).

At the hearing, Amandeep Dhaliwal testified that when AAA Contracting began operations she would transport Gurminder Dhaliwal to and from project sites and do office work (CD at 46:00). She further testified that her primary role at AAA Contracting continues to be administrative, handling office work and payroll (CD at 46:10).

Applicant failed to meet its burden to demonstrate that the record that was before the Division at the time of the denial did not contain substantial evidence to support the Division's determination that decisions pertaining to the core functions of AAA Contracting are not made by Amandeep Dhaliwal as required by 5 NYCRR 144.2(b)(1).

Control: Control of Negotiations

The regulatory criterion states that the applicant must demonstrate the that minority group members have "control of negotiations . . . through production of relevant documents" (5 NYCRR 144.2[b][3]).

The Division argues that because the only fully executed contracts that applicant supplied were signed by Gurminder Dhaliwal, applicant failed to demonstrate through the production of documents that Amandeep Dhaliwal controls negotiations (exhibit 3 at 3; CD at 47:20). The Division states that it specifically requested executed contracts (CD at 29:00 [Farias testimony]; see also exhibit 2 [item #7 (document request for AAA Contracting's three "most recent signed and executed contracts")]). The Division argues that only fully executed contacts should be considered (CD at 47:50).

Applicant asserts that the Division should have requested more documents after receiving the three contracts submitted by the applicant (CD at 41:30). To demonstrate Amandeep Dhaliwal's control, applicant provided documents at the hearing, including several change orders, that were signed by Ms. Dhaliwal (see exhibits 14-19). These documents were not provided by AAA Contracting during the application process.

Although one of the three contracts supplied with the application materials was signed by Amandeep Dhaliwal, it was not executed by the other party to the contract (see findings of fact ¶ 7). The Division requested signed and executed contracts and it is not unreasonable for the

Division to rely on same in its evaluation of the MBE application. As noted above, Gurminder Dhaliwal signed the two contracts that were fully executed. It is also notable that the description of the duties of key personnel that was supplied by the applicant expressly states that Gurminder Dhaliwal is responsible for negotiating contracts and omits this duty from the list of Amandeep Dhaliwal's duties (exhibit 4). I conclude that the application materials contain substantial evidence in support of the Division's determination on this issue.

Applicant failed to meet its burden to demonstrate that the record that was before the Division at the time of the denial did not contain substantial evidence to support the Division's determination that the documents produced by applicant do not demonstrate that Amandeep Dhaliwal controls negotiations as required by 5 NYCRR 144.2(b)(3).

CONCLUSION

Applicant failed to meet its burden to demonstrate that the record lacks substantial evidence to support the Division's determination to deny AAA Contracting's application on the bases of whether the minority owner, Amandeep Dhaliwal, (i) has adequate managerial experience or technical competence to operate the business enterprise (see 5 NYCRR 144.2[b][1][i]); (ii) makes decisions pertaining to the operations of the business enterprise (see 5 NYCRR 144.2[b][1]); and (iii) controls negotiations (see 5 NYCRR 144.2[b][3]).

RECOMMENDATION

For the reasons stated herein, the determination of the Division to deny AAA Contracting Services Corp. certification as a minority-owned business enterprise should be affirmed.

**Matter of AAA Contracting Security
DED File ID No. 60417**

Exhibit List

Exh. #	Description
1	AAA Contracting MBE Application, certified May 15, 2015 (citations to the Application are to the pages as numbered)
2	Division request for additional information from applicant
3	Division MBE Denial Letter to AAA Contracting, dated January 13, 2017
4	AAA Contracting listing of duties of key personnel
5	AAA Contracting NYS Quarterly Combined Withholding
6	2014 federal tax return for Amandeep Dhaliwal
7	Resume of Amandeep Dhaliwal
8	Resume of Gurminder Dhaliwal
9	Gurminder Dhaliwal Safety Net 32hr Rigging Foreman Training certificate
10	Subcontract Agreement
11	Standard Form Agreement
12	Standard Form Agreement
13	Division Email to AAA Contracting re: rejection of MBE Application
14-18	Change Orders
19	AAA Contracting applications for payment
20	AAA Contracting certifications for MBE or MWBE from other authorities